

I. **TENNESSEE REVISED UNIFORM PARTNERSHIP ACT** (Tenn. Code Ann. §§ 61-1-101 through 61-1-1208)

A. General –

1. In general, Tennessee statutory partnership law follows the Revised Uniform Partnership Act.

2. The **Tennessee Revised Uniform Partnership Act** was signed into law in 2001.

B. Governing Law – Under Tennessee’s partnership act, partners may choose the applicable state law by which the partnership will be governed, whereas the Revised Uniform Partnership Act provides that laws of the state in which a partnership’s “chief executive office” (an undefined term) is located govern the partnership. Tennessee retains the Revised Uniform Partnership Act rule as a default.

C. Statement of Authority – The Tennessee partnership act omits the Revised Uniform Partnership Act mandate that a statement of authority list the names and addresses of all partners (or of any agent who can provide that information on request) to help preserve the privacy of the partners’ personal information.

D. Oral Partnership Agreements – Under Tennessee decisional law, an oral partnership agreement must be proven by clear and convincing evidence.

E. Classification of Partners – Tennessee’s partnership statute, unlike the Revised Uniform Partnership Act, permits the inclusion in the partnership agreement of a provision designating multiple classes of partners with distinct distribution and management rights.

F. Fiduciary Duty of Loyalty – The Tennessee partnership statute allows partnership agreements to eliminate the fiduciary duty of noncompetition because of the wide use of partnerships in real estate investment (a business sector in which partners typically invest in multiple properties that may be in direct competition).

G. Partner Buyout on Wrongful Dissociation – Tennessee uses a “material hardship” standard rather than the Revised Uniform Partnership’s “undue hardship” standard for early payouts to wrongfully dissociated partners in partnerships for a definite term or particular undertaking. In addition, although the Revised Uniform Partnership Act requires a partnership to secure deferred buyout payments, Tennessee’s statute does not include this requirement.

H. Satisfaction of Judgment with Partner Assets – Under Tennessee law, absent a partnership’s bankruptcy or an enforceable agreement to the contrary, a judgment creditor of a partnership cannot satisfy that judgment by levying against a partner’s assets unless (1) the partner is personally liable, (2) a judgment based on the same

claim has been obtained against the partnership, and (3) a writ of execution on the judgment has been returned unsatisfied in whole or in part.

I. Taxation – Practice point: Under Tennessee state tax law, franchise and excise taxes are imposed on limited liability entities (i.e., registered limited liability partnerships, limited partnerships, limited liability companies, and corporations), but not on partnerships (commonly referred to as “general partnerships”).

II. **TENNESSEE REVISED UNIFORM LIMITED PARTNERSHIP ACT** (Tenn. Code Ann. §§ 61-2-101 through 61-2-1209, the “**Old LP Act**”) and Tennessee Uniform Limited Partnership Act of 2017 (Tenn. Code Ann. §§ 61-3-101 through 61-3-1207, the “**New LP Act**”)

A. General –

1. Tennessee has two extant limited partnership acts, neither of which has a sunset provision.

2. The **New LP Act**, which is primarily based on the version of the Revised Uniform Limited Partnership Act in effect in or about 2016, became effective on January 1, 2018.

3. All limited partnerships formed on or after that date are governed by the **New LP Act**.

4. The **Old LP Act**, which is primarily based on a prior version of the Revised Uniform Limited Partnership Act, governs each limited partnership formed prior to January 1, 2018 unless it opts into the **New LP Act**.

5. A primary structural and functional feature of the **Old LP Act** is its cross-reference to Tennessee general partnership law rules and norms for significant aspects of the law that are not expressly covered in the **Old LP Act** itself. In other words, the **Old LP Act**, unlike the **New LP Act**, is not a wholly self-contained set of the rules applicable to limited partnerships governed under it.

6. Transition rules under the **Old LP Act** applicable to earlier formed limited partnerships are complex and deserve special and concerted attention by a practitioner working with limited partnerships organized before January 1, 1989.

a) In general, however, all limited partnerships formed on or after January 1, 1989 are governed by the **Old LP Act**.

b) With certain exceptions, all limited partnerships formed on or after January 1, 1988, and prior to January 1, 1989 under the predecessor limited partnership act continued to be governed by that predecessor act until July 1, 1989, at which time those limited

partnerships became governed under the **Old LP Act**. Notably, however, any limited partnership formed prior to January 1, 1989 could elect to be governed by the predecessor limited partnership act.

c) Otherwise, a limited partnership formed prior to January 1, 1988 continued to be governed by the predecessor limited partnership act, except that any of these limited partnerships cannot extend its term except under the **Old LP Act**.

B. Limited Liability Limited Partnerships – The **New LP Act** allows for the formation of limited liability limited partnerships; the **Old LP Act** does not.

C. Fiduciary Duties –

1. Under the **Old LP Act**, a general partner fails to comply with the statutory duty of care if the partner is negligent. I.e., general partners are required to act with the care an ordinarily prudent person in like circumstances would exercise under similar circumstances. Accordingly, the duty of care of a general partner under the **Old LP Act** differs from the standard of care for a partner in a Tennessee partnership governed under the **Tennessee Revised Uniform Partnership Act**.

2. The **New LP Act** adopts a gross negligence standard for a general partner's duty of care, aligning the standard of care for general partners under the **New LP Act** with the standard of care applicable to partners in partnership governed under the **Tennessee Revised Uniform Partnership Act**.

3. Although Delaware's limited partnership act permits the elimination of fiduciary duties altogether, neither the **New LP Act** nor the **Old LP Act** allows for the elimination of fiduciary duties. However, under both the **New LP Act** and the **Old LP Act**, partners may modify or tailor certain fiduciary duties in their partnership agreement within specific statutory constraints.

D. Third-Party Liability of Limited Partners – Under the **New LP Act**, the rules on limited partner liability to third parties are significantly simpler.

1. Under the **Old LP Act**, if a limited partner participates in control of the business and the person he is dealing with reasonably believes him to be a general partner, he is liable to that person as a general partner. Under the **New LP Act**, regardless of control and the reasonable belief of third parties, limited partners are not liable to third parties for the obligations of the limited partnership.

2. Under the **New LP Act**, until corrective action is taken, a person who makes an investment in a business enterprise and erroneously, but in good faith, believes that the person has become a limited partner in the enterprise is liable to the same extent as a general partner to any third party that enters into a transaction with the enterprise believing in good faith that the person is a general partner. Under the **Old LP Act**, a limited partner is not

liable unless, in addition to the foregoing, the third party asserting liability reasonably relied on the partner's credit and the third party's good faith belief in the partner's status as a general partner.

III. **TENNESSEE LIMITED LIABILITY COMPANY ACT** (Tenn. Code Ann. §§ 48-201-101 through 48-248-606, the "**Old LLC Act**") and Tennessee Revised Limited Liability Company Act (Tenn. Code Ann. §§ 48-249-101 through 48-249-1133, the "**New LLC Act**")

A. General –

1. Tennessee has two extant limited liability company acts, neither of which has a sunset provision.

2. Neither the **Old LLC Act** nor the **New LLC Act** is based on the two current national normative limited partnership statutes, the Delaware Limited Liability Company Act and the Revised Uniform Limited Liability Company Act.

3. The **New LLC Act** became effective on January 1, 2006.

4. All limited partnerships formed on or after that date are governed by the **New LLC Act**.

5. The **Old LLC Act** governs each limited partnership formed prior to January 1, 2006 unless it opts into the **New LLC Act**.

6. The **New LLC Act** is a unique limited liability company act—the only one of its kind in the United States in that it provides for three types of limited liability company (member-managed, manager-managed, and director-managed). The Delaware Limited Liability Company Act and the Revised Uniform Limited Liability Company Act each provide for two types of limited liability company (member-managed and manager-managed).

7. The **Old LLC Act** was drafted to help ensure that limited liability companies would be taxed as partnerships, rather than corporations, under then applicable federal income tax rules. After the enactment of the **Old LLC Act**, federal income tax rules applicable to limited liability companies were relaxed to provide for default taxation of limited liability companies as partnerships, unless the firm decided to be taxed as a corporation (under the so-called "check the box" rules). This change in federal income tax regulation rendered the complex statutory rules under the **Old LLC Act** unnecessary.

B. Terminology –

1. Formation – The chartering document filed with the Secretary of State to form a limited liability company under either the **New LLC Act** or the **Old LLC Act** is called "articles of organization." By contrast, Delaware's chartering document for a limited liability company is called a "certificate of

formation,” a term also recently incorporated into the Revised Uniform Limited Liability Company Act.

2. Agreement – The **New LLC Act** and the **Old LLC Act** refer to the internal governance agreement between or among the members and the limited liability company as an “operating agreement,” the term used in the Revised Uniform Limited Liability Company Act. The Delaware statute uses the term “limited liability company agreement.”

3. Membership – The **New LLC Act** and the **Old LLC Act** refer to ownership interests in the limited liability company as “membership interests.” Delaware’s statute refers to these interests as limited liability company interests.

4. Governor – Under the **Old LLC Act**, the term “governor” refers to a member of the board of governors, the governing body of a limited liability company governed under that act. This term is not used in either the Delaware Limited Liability Company Act or the Revised Uniform Limited Liability Company Act.

5. Additional Terms Introduced or Modified under **the New LLC Act** –

a) Manager – This term refers to a named officer of the LLC under the **Old LLC Act** and one who exercises or delegates powers of management or control of the firm under the **New LLC Act**. This term also is used in both the Delaware Limited Liability Company Act and the Revised Uniform Limited Liability Company Act with slightly definitions ascribed to the term in each.

b) Director – This term refers to a member of the board of directors in a director-managed limited liability company governed under the **New LLC Act**, which is the governing body with authority to manage the business and affairs of the limited liability company (as in a corporation).

c) Officer – Under the **New LLC Act**, an officer of the limited liability company is a person who is in good faith afforded rights and powers to manage and control the business and affairs of the limited liability company, provided that such delegation is reasonable under the circumstances and made in good faith. An officer need not be a member of the LLC.

d) Holder of Financial Rights – The **New LLC Act** creates a novel class of interest holder. A “holder of financial rights” is a person who is not a member of the limited liability company that holds financial,

but not governance, rights in a limited liability company. The holder may acquire the financial rights either by transfer of ownership from a member or other holder or by issuance or transfer directly from the firm.

e) LLC Documents – For ease of reference, the **New LLC Act** also indicates that either or both of the articles of organization or/and the operating agreement (written or oral) of a limited liability company comprise the “LLC documents.”

**C. Management –**

**1. The Old LLC Act** provides for a choice of one of two forms of management.

a) Member-managed – All members of the limited liability company are actively involved in the ownership, management, and operation of business (similar to partners in a partnership or limited liability partnership). This form of management is common to the member-managed structure under the Delaware Limited Liability Company Act and the Revised Uniform Limited Liability Company Act.

b) Board-managed – Under this management structure, the limited liability company is managed by or under the direction of a board of governors, which hires a manager to run the business (similar in some aspects to a corporate management structure). Neither the Delaware Limited Liability Company Act nor the Revised Uniform Limited Liability Company Act provides for this form of management.

**2. The New LLC Act** provides for three possible forms of management.

a) Member-managed – This form is the same as that described in Part III.C.1.a., above.

b) Manager-managed – In this form of limited liability company, the business is managed by a manager or managers designated, appointed, or elected by the members. This is similar in some aspects to the management structure in a limited partnership, except that the manager need not be an owner of the firm.

c) Director-managed – This management structure provides for the exercise of all LLC powers under the authority and direction of a board of directors, the members of which are designated, appointed, or elected by the members. Unique to Tennessee, the structure mimics a corporate structure wherein the directors must be individuals, cannot appoint proxies, and that liability for breaching the duty of loyalty cannot be waived in the operating agreement.

D. Membership Series and Series Limited Liability Companies –

1. Under the **New LLC Act** (as well as the Delaware Limited Liability Company Act), a limited liability company may establish one or more series of members, managers, limited liability company membership or ownership interests, or assets, with each series having separate rights, powers, or duties or a separate business purpose.
2. A series limited liability company established under the authority provided in the **New LLC Act** ties certain assets with certain liabilities. Stated differently, a series limited liability company, if formed correctly, will protect the assets of a particular series from the liabilities of another series, in much the same way as a subsidiary organized as a limited liability entity.
3. Neither the **Old LLC Act** nor the Revised Uniform Limited Liability Company Act authorizes series limited liability companies (although the latter contemplates and should respect the resulting limited liability shields). The Uniform Law Commission has recently adopted a Uniform Protected Series Act. Legislation to adopt a form of that uniform act has been introduced in the 2019 legislative session in Tennessee.

E. Operating Agreements –

1. Under the **New LLC Act**:
  - a) Holders of financial rights, as well as members of the limited liability company and the limited liability company itself, may be parties to the operating agreement;
  - b) An oral operating agreement is permitted unless the articles of organization require that the operating agreement be in writing; and
  - c) An operating agreement may consist of multiple documents that, when taken together, make up the agreement of the members on how to govern the firm and their financial interests in it.
2. The rules for operating agreements under the **New LLC Act** are similar, but not identical, to those relating to limited liability company agreements under the Delaware Limited Liability Company Act (which provides that limited liability company agreements may be “written, oral or implied”) and those under the Revised Uniform Limited Liability Company Act (which provides that operating agreements may be “oral, in a record, implied, or in any combination”).
3. Under the **Old LLC Act**, operating agreements, when required, must be in writing.

a) A member-managed limited liability company is not required to have an operating agreement.

b) A board-managed limited liability company also is not required to have an operating agreement, but if it does have an operating agreement, it must be in writing

F. Freedom of Contract –

1. General – The current trend in LLC Acts is to allow the members increasing freedom to contract.

2. Fiduciary Duties –

a) Although Delaware’s limited liability company act permits the elimination of fiduciary duties altogether, neither the **New LLC Act** nor the **Old LLC Act** allows for the elimination of fiduciary duties. However, under both the **New LLC Act** and the **Old LLC Act**, partners may modify or tailor certain fiduciary duties in their partnership agreement within specific statutory constraints. The **Old LLC Act** also allows for the elimination of a governor’s monetary liability for good faith breaches of the duty of care.

b) The duties of care and loyalty owed by a member in a member-managed and a manager in a manager-managed limited liability company governed under the **New LLC Act** are the same and reflects the default fiduciary duties provided for under the Revised Uniform Limited Liability Company Act. For example, the standard of care of members and managers, respectively, requires that the member or manager (as applicable) refrain “from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law.” The duty of loyalty of a member in a member-managed and a manager in a manager-managed limited liability company governed under the **New LLC Act** is the same as that of a partner under the **Tennessee Revised Uniform Partnership Act**. Delaware’s limited liability company statute does not expressly provide for fiduciary duties of members or managers but allows for the application of equitable fiduciary duties.

c) The **New LLC Act** and the **Old LLC Act** each expressly provide for ways to cleanse a conflicting interest transaction of its self-interest taint. The rules are similar. Each involves obtaining the good faith, disinterested approval of members or managers or establishment of the fairness of the transaction. Neither the Delaware Limited Liability Company Act nor the Revised Uniform Limited Liability Act includes a provision of this kind, which comes from state corporate law doctrine.

d) The fiduciary duties of a director of a director-managed limited liability company governed under the **New LLC Act** require the director to act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the firm. This is the same standard of conduct applicable to members of a member-managed limited liability company and governors of a board-managed limited liability company under the **Old LLC Act**.

e) Under the **New LLC Act**, unless a member also exercises some or all of the rights of a director in a director-managed limited liability company, a member of a manager-managed or director-managed limited liability company does not owe fiduciary duties to the limited liability company, fellow members, or holders of financial rights “solely by reason of being a member.” The **Old LLC Act** is silent on the fiduciary duties of members in a board-managed limited liability company.

f) The Tennessee Court of Appeals has adopted core principles from Massachusetts corporate decisional law providing for fiduciary duties of shareholders to each other in closely held firms and applied those principles to members in the limited liability company context. *See Anderson v. Wilder*, No. E200300460COAR3CV, 2003 WL 22768666, at \*5-6 (Tenn. Ct. App. Nov. 21, 2003); *see also infra* Part IV.E. Accordingly, members in a privately held Tennessee limited liability company owned and managed by individual family members and close acquaintances may owe a duty of utmost loyalty to each other. Although the matter is not free from doubt, this duty may be construed to be immutable.

### 3. Agency –

a) The **New LLC Act** and the **Old LLC Act** generally provide that, unless the articles of organization otherwise provide, members of a member-managed limited liability company acting in the ordinary course of the firm’s business on its behalf are agents of the firm.

b) The **New LLC Act** expressly states that a manager of a manager-managed limited liability company acting in the ordinary course of the firm’s business on its behalf generally is an agent of the firm unless the manager did not have authority to act. A member of a manager-managed limited liability company is not an agent of the firm by virtue of being a member.

c) For director-managed limited liability companies, the **New LLC Act** expressly states that neither a member nor director of the limited liability company is an agent of the firm by virtue of being a member or director, respectively. If a director-managed limited liability

company has a president, then the president generally is an agent of the firm.

d) The agents of a board-managed limited liability company governed under the **Old LLC Act** include: (i) the chief manager, (ii) any person designated in the articles or the operating agreement, and (iii) any person designated in writing by action of the governors as being so authorized.

e) The Delaware Limited Liability Company Act is silent as to agency authority of members and managers, giving the parties the freedom to decide the agency authority of members or managers.

f) The Revised Uniform Limited Liability Company Act expressly states that a member of a limited liability company is not an agent of the LLC by virtue of being a member. It is silent as to the agency authority of manager in a manager-managed limited liability company, giving the parties the freedom to decide the agency authority of members or managers.

#### G. Transfers of Interests –

1. A member of a Tennessee limited liability company governed under the **New LLC Act** or the **Old LLC Act** can freely transfer the member's financial rights—the right to receive distributions of profits and losses.

2. Under the **New LLC Act**, a member can transfer governance rights freely in a single-member limited liability company and to another member in any limited liability company. Other transfers of governance rights by members of Tennessee limited liability companies may be made only with the unanimous consent of the other members, unless the articles or operating agreement allows transfer (a) under the **New LLC Act** or (b) by a majority vote of members under the **Old LLC Act**.

3. Under the Delaware Limited Liability Company Act, the assignment of a limited liability company interest entitles the assignee to share in profits and losses, receive distributions, and receive allocations of income, gain, loss, deduction, credit, or similar items, but does not entitle the assignee to become or to exercise any rights or powers of a member.

4. Under the Revised Uniform Limited Liability Company Act, a member may transfer rights to distributions, but (other than in the case of a transfer on death) that transfer does not afford the transferee governance rights in the firm.

#### H. Member Withdrawal and Dissolution

1. Under the **New LLC Act**, an LLC is dissolved

- a) upon the expiration of a period fixed in the articles of organization,
- b) upon the occurrence of an event specified in the LLC documents,
- c) upon an action of the members or organizers taken in accordance with requirements set forth in the statute,
- d) upon a court order or action of the Secretary of State as provided for in the statute, or
- e) under certain circumstances, when there are no members.

2. Under the **New LLC Act**, a withdrawing member is entitled to receive “fair value” for its membership interest subject to offset for damages due to withdrawal.

3. The **Old LLC Act** provides for an automatic dissolution and wind-up upon any member’s resignation, retirement, death, or bankruptcy (among other events—including any other event that terminates a member’s continued membership in the limited liability company). However, an LLC governed under the **Old LLC Act** may avoid dissolution if there is at least one remaining member and a majority of the remaining members consent.

4. The core dissolution provisions in the **New LLC Act** are similar to some of the dissolution provisions in the Delaware Limited Liability Company Act.

5. The Revised Uniform Limited Liability Company Act takes a different approach to dissolution and withdrawal—one based on the structure of the dissolution and dissociation provisions included in the Revised Uniform Partnership Act.

I. Family Limited Liability Companies – The **New LLC Act** provides for the organization of a “Family LLC.”

1. A few important aspects of and observations about this form of limited liability company are set forth below.

- a) Members of the limited liability company must be members of the same family.
- b) Members of the same family must hold in aggregate at least 50% of the financial rights in the limited liability company.
- c) The definition of “family” is complicated and, as provided in the statute, could include financial interests held by entity of an individual.

- d) Family LLCs are used for estate planning purposes
- e) A limited liability company that meets the statutory definition of a Family LLC can opt out of Family LLC treatment.

2. Family LLCs are not provided for in either the Delaware Limited Liability Company Act or the Revised Uniform Limited Liability Company Act.

J. Nonprofit Limited Liability Companies - Tennessee has a nonprofit limited liability company option, provided for in the **Tennessee Revised Nonprofit Limited Liability Company Act**, codified in Tenn. Code Ann. §§ 48-101-801 through 48-101-809. Neither the Delaware Limited Liability Company Act nor the Revised Uniformed Limited Liability Company Act includes this option. The nonprofit limited liability company must have a tax-exempt nonprofit as its sole member and its structure must be disregarded for federal income tax purposes.

#### IV. **Tennessee Business Corporation Act** (Tenn. Code Ann. §§ 48-11-101 through 48-27-103)

##### A. General –

1. In general, Tennessee statutory corporate law follows the Model Business Corporation Act (as amended through 2011); however, some provisions reflect principles from the Delaware General Corporation Law.

2. The most recent significant substantive revisions to the **Tennessee Business Corporation Act** other than the addition of the **Tennessee For-Profit Benefit Corporation Act** referenced below, were signed into law in May 2012 and became effective on January 1, 2013.

3. Chapter 27 of Title 48 of the Tenn. Code Ann. (Tenn. Code Ann. §§ 48-28-101 through 48-28-109) is known as the **Tennessee For-Profit Benefit Corporation Act**, a part of the state for-profit business corporation law that allows for the organization of a for-profit corporation “that intends to pursue a public benefit or public benefits.”

4. The Tennessee For-Profit Benefit Corporation Act should not be confused with Tennessee public benefit and mutual benefit corporations, which are distinctions under the **Tennessee Nonprofit Corporation Act** (Tenn. Code Ann. §§ 48-51-101 through 48-68-211).

B. Formation – The corporate charter in Tennessee is called a charter, unlike in most Model Business Corporation Act jurisdictions (where the term used is the standard term from that model act, articles of incorporation. However, the filing for amending a charter in Tennessee is called articles of amendment (which is the standard Model Business Corporation Act term).

C. Shareholder Agreements – Tennessee has not fully modernized its part of the business corporation statute relating to shareholder agreements—agreements signed by all shareholders that alter the board’s management authority or other fundamental corporate governance norms. Tennessee law generally validates written agreements between/among all corporate shareholders “to restrict the discretion of the board of directors in its management of the business of the corporation or to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners.” However, the model act provision validating shareholder agreements is far more detailed than Tennessee law on the permitted contents of the agreement, the possible valid form and location of the agreement, and the associated requirements.

D. Domestications – Tennessee’s statute does not provide for “domestications” as a form of fundamental change transaction to change the state of domicile of a for-profit corporation. Instead, under Tennessee law, a practitioner would use a form of merger to change a corporation’s state of incorporation.

E. Closely Held Corporations – Tennessee judicial opinions have adopted core principles from Massachusetts decisional law on the fiduciary duty of shareholders to each other in closely held corporations. Accordingly, shareholders in a privately held Tennessee corporation owned and managed by individual family members and close acquaintances owe a duty of utmost loyalty to each other. *See Nelson v. Martin*, 958 S.W.2d 643, 648 (Tenn. 1997), *overruled on other grounds by Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002); *see also Hall v. Tennessee Dressed Beef Co.*, 957 S.W.2d 536, 540-41 (Tenn. 1997); *Rennell v. Through the Green, Inc.*, No. M200801906COAR3CV, 2009 WL 2365564, at \*2 (Tenn. Ct. App. July 31, 2009).